Chapter Ten

Montesquieu and the History of Laws

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At the end of *The Spirit of Laws*, Montesquieu presents three books, XXVIII, XXX, and XXXI, in which he describes the development of the civil and constitutional laws of his own country. The three books, taken together, show a picture of a state which has gone through many changes, but whose spirit is that of a "moderate monarchy," one in which the king governs by known laws, and with the help of intermediary powers.

These historical books describe the evolution of the French monarchic state from the time of the barbarian invasions in the fifth century A.D. up to the accession of Hugh Capet at the end of the tenth century, and of the evolution of French civil law up to about the sixteenth century when Roman law was reestablished as the law of the land in parts of France and various codes of customary law were established in the rest of the country. They offer one illustration of the theory of monarchy put forward in Book II, chapter 4 of *The Spirit of Laws*. Another illustration is provided by the celebrated description of the constitution of England in Book XI, chapter 6 supplemented by Book XIX, chapter 27, but as this describes the England of Montesquieu's own time, the two constitutions cannot be directly compared. As he explains in the Preface to *The Spirit of Laws,* Montesquieu is writing for a much wider public than France. Consequently in the statements he makes in Book II, chapter 4 and elsewhere about the monarchic state in general, the need for intermediate powers, the role of the nobility and the role of political bodies charged with declaring and upholding the laws, the reader must guard against interpreting these as practical recommendations intended for the actual government of France. Montesquieu was very widely read; he had travelled in Europe and conversed and corresponded with many educated and influential people in his own country and elsewhere.

He had some first hand experience of the workings of government, though his direct experience was restricted to his own Parlement of Bordeaux where he served as a magistrate between 1716 and 1726, apart from a short period as a student in Paris, when in about the year 1711 he observed a number of cases brought before the Parlement of Paris. He intends his conclusions, unless specifically directed at particular targets, to be understood as conclusions of general relevance in relation to different types of states.

Emile Chénon, in the second volume of his *Histoire générale du droit français public et privé* (Paris, 1929), which is still an invaluable source for understanding the evolution of French law, ably described the legal situation after the decline of the feudal system. He likened the theoretical power of the French kings to that of the Roman emperors. Kings were responsible for legislation. They accepted perhaps the existence of certain fundamental laws,[1] ill-defined and mostly relating to the establishment of the monarchy itself, while the Parlements maintained that their own right to register laws, and to make remonstrances before doing so, was itself a fundamental law. Chénon summarizes the situation as follows:

> The king was persuaded that he could not infringe the fundamental laws, and in general he did not do so. Most of them were in any case in his interest or at least in the interest of the monarchy. But if he had wanted to violate them, who could have prevented him? The theory of the fundamental laws was in fact only a moral limit on the power of the king: this limit, amply sufficient when a Saint Louis is on the throne, must have appeared less of a safeguard to the subjects of Louis XIV.[2]

Nevertheless, the system lasted until almost the outbreak of the Revolution, not without problems and dissensions, but in a reasonably effective way. In 1770-71, however, roughly a decade and a half after the death of Montesquieu, a crisis occurred which brought home to parlementaires, whose key role Montesquieu had so stressed, and to others interested in political debate—former parlementaires, other office-holders, nobles, the academies and salons, academics and educated people—the lack of any effective constitutional barriers to the power of the king. While France was in the grip of severe financial and economic troubles, the Parlements refused to register edicts imposing new taxes, repudiating public debts, and suspending payment of interest. They then refused to approve edicts limiting their own powers, and published a remonstrance "alleging the multiplicity of acts of absolute power exercised at that time against the spirit of the laws which constitute the French monarchy," with a reminder to the king that one of these laws preserved his own right to the throne and the succession of his heirs.[3] The chancellor, René-Nicolas de Maupeou, arranged for the edicts to be passed by the king in an official *lit de justice*, but the parlementaires showed their dissatisfaction by refusing to conduct legal business. After

this provocation, the chancellor had no difficulty in getting the king's consent by a decree of January 1771 to send the existing members of the Parlement of Paris into exile and set up a new Parlement of Paris and later on new provincial Parlements, with different personnel and new, and more restrictive terms of reference.[4] Although the powers of the Parlements were restored in the two years after Louis XVI came to the throne in 1774, Maupeou's actions had shown how easily they could be overturned by arbitrary action. As William Doyle has commented:

> The events of 1771 clarified matters in the most brutal way. Chancellor Lamoignon declared that the king was a sovereign to whom everything was not permitted but everything was possible. Chancellor Maupeou proved it—there was nothing the king could not do, permitted or not, if he were determined. . . . The Parlements could no more prevent their own reformation than Terray's tax increases or anything else. In the view of most magistrates and many others besides, Louis XV had crossed the narrow divide between monarchy and despotism, and it was clear, if it had not been before, that there were no effective regular checks on government in France.[5]

All this of course was in the future when *The Spirit of Laws,* published in 1748, was being composed, but debate on the French constitution had been a live issue long before then. Three works published between the late sixteenth century and the early seventeenth century typify the range of opinion. The first, the *Franco-Gallia* or *La Gaule Françoise,* by François Hotman, was published in Latin in 1573 and French in 1574, at a time when the break-up of Christendom and, in France, the Wars of Religion and particularly the massacre of St. Bartholomew's day in August 1572 were forcing people to consider the nature and location of authority in the state. All three authors accepted the fact of kings at the head of the state, but their different ideas on the succession to the throne, and on the legitimate exercise of authority, set the scene for discussions of the French constitution up to the Revolution. Hotman contended that, by the long tradition of French Gaul, kings should be elected, and deposed if necessary, and laws should be made, by the Estates, meeting in an annual assembly.[6] A much more famous writer was Jean Bodin, whose *Six Books of the Commonwealth,*[7] published in 1576, approached the question of the right organization of the state on general grounds, focusing on the political community as such, rather than from a specifically French angle. His reasoning led him to the conclusion that, to avoid anarchy, the recognition of an absolute sovereign power was essential, though the ruler had an obligation to obey the laws of God. A little later, the discussion, particularly as it concerned the state of France, was taken up by Bernard de La Roche-Flavin in his *Treize livres des Parlements de France*, published in 1617.[8] He argued that, first, the Parlement of Paris, and then all the other Parlements, were the true successors of the early *Assemblées des Grands*

which advised the sovereign and had the power, with the sovereign, to make law.

The Dynastic Argument: Boulainvilliers and Dubos

Although in 1748 the Revolution was still some forty years ahead, there was a considerable degree of uneasiness in the Old Regime leading to an ever increasing constitutional debate. I propose here to consider just two of the causes, both relating to constitutional law, which contributed to this unease. In a monarchy in which the king exercises real power, arrangements for the succession are of crucial importance.

Between the death of Henri IV in 1610 and the Regency period of the early eighteenth century, the crown had three times been inherited by a child too young to exercise personal power. This had led to the prolonged regencies of Marie de Medici during the minority of Louis XIII, Anne of Austria during the minority of Louis XIV, and Philip, Duke of Orleans during the minority of Louis XV, accompanied by the often resented influence of first ministers, including the cardinals Richelieu and Mazarin. Many of the high nobility in particular resented and feared the first ministers since they wished to look upon themselves as entitled by birth to be the king's counsellors, though no regular forum was established for that purpose. The Parlements also, led by the Parlement of Paris, resented the first ministers. It was the job of the Parlements to register legislation, and they were able to exercise some influence on the form that legislation, took by using their powers of remonstrance, so that they too regarded themselves as the legitimate advisors of the king.

The two conflicting interests never made common cause, and during the minority of Louis XV the Parlements soon gained an advantage. Orleans' right to act as Regent was itself contentious. The deaths in 1711-12 of both the duc de Bourgogne, grandson and heir of Louis XIV, and of Bourgogne's elder son brought very close the prospect that King Philip V of Spain, younger grandson of Louis XIV, might in the future also claim the throne of France. The heir apparent was Bourgogne's younger son, the future Louis XV, but he was still a very young child when his great grandfather, Louis XIV died, and after him the nearest in blood was Philip of Spain. The prospect of a union of the kingdoms of France and Spain was anathema to the coalition powers, particularly England, which fought against France in the War of the Spanish Succession. Therefore, as a preliminary to the Treaty of Utrecht, they insisted that Philip V renounce any claim to the succession. He did in fact do so in 1712, and Louis XIV issued a decree to this effect, registered by the Parlement of Paris in 1713. The validity of the renunciation was questioned by many in France, however, as a violation of the fundamental law of the royal succession. When Louis XIV died, some argued that Philip V, as the nearest in blood, should be Regent in place of Philip

of Orleans during the new king's minority.[9] Nevertheless, Orleans took up the post of Regent and took the precaution of immediately referring the matter to the Parlement of Paris, which duly registered the appointment. The validity of the renunciation by Philip V of Spain of any right to succession to the throne of France was never tested legally, since Louis XV survived to reign until 1774 and provided legitimate heirs in the direct line. The uncertainty of the succession, however, helped to unsettle the nobility and the Parlements, and encouraged political debate. The nobility, taking the view that they, rather than the Parlement, should have been consulted, were now meeting in an unauthorized assembly of their own, as Franklin Ford describes:

> On the peers' side, the strategy of publication and appeals addressed to the Regent was laid out in a long series of meetings which began on the very day of Louis XIV's death. In the Archives Nationales one can still read a thick pack of invitations announcing gatherings at the homes of such leading activists as the Archbishop of Reims, the Duc de la Force, the Duc d'Uzès and the Duc de Tresmes. At these meetings of which no fewer than fifty-five took place between September 1 1715 and February 22 1717 the peers discussed both the parlementary issue and that of the *légitimés*.[10]

Who were the *légitimés*, and why should the peers discuss them? Before his death, Louis XIV had declared his two illegitimate sons by Madame de Maintenon, the duc du Maine and the comte de Toulouse, to be legitimate and had given them an intermediate rank below the legitimate princes of the blood and above the *ducs et pairs de France.* In his will he added them to the line of succession to the throne and in 1715 accorded them the status of princes of the blood. After his death these actions gave rise to a great deal of dissension as people took sides, and a regular war of pamphlets broke out. Again the parties to the dispute were not united in their aims, and all they achieved was to provoke the Regent into action. The unauthorized assembly of high nobles was dissolved by a decree of the Regency Council in 1717, the nobles were denied the right to hold assemblies without the express permission of king or Regent, and, without involving the Parlement, a commission was also set up to look into the claims of the legitimate and legitimated princes. Eventually the Regent issued a decree, registered by the Parlement of Paris on 6 July 1717, which denied any right of Maine and Toulouse to the succession, although they kept their titles and intermediate rank.[11]

Underlying both dynastic arguments was the problem of authority. Did the king have absolute authority, even over his own successors, or was his authority subject to fundamental laws? And what were the fundamental laws? How had they come into being? Could they be altered and if so, by what person or process? Most of the theories put forward in the eighteenth century concerning this problem have been divided by historians into two schools, known as the *thèse*

royale and the *thèse nobiliaire.* In general, advocates of the royal thesis maintained that the king's authority was literally absolute, subject only to self-imposed limitations. Advocates of the nobility thesis, however, maintained that other institutions and powers in the state, particularly the nobility, also had the historic right and duty to play a part in the government of France. Montesquieu was quite familiar with the views of the chief expositors of these two schools, the comte de Boulainvilliers,[12] and the abbé Dubos.[13] His own mature view of the succession issue, though he does not specifically relate it to the royal succession in France, was expressed in Book XXVI, chapter 16 of *The Spirit of Laws*. He says that the order of succession is founded, in monarchies, on the good of the state, which demands that there should be a reigning family and that the order of succession should be fixed. This is a matter of political not civil law. Once the order has been fixed, it would be absurd to alter it according to the precepts of a civil law meant for individuals. Also once a family has renounced the succession, it would be absurd to invoke a civil law to restore their rights: "It is absurd to claim to settle the rights of kingdoms, nations, and the universe," Montesquieu asserts, "by the same maxims used to decide a right concerning a drainage pipe disputed between private individuals, to make use of Cicero's expression" (XXVI, 16).

In the historical books, Montesquieu refers to and quotes from many original sources. He did not seek out manuscript material. If he had wished to do so, his poor eyesight would have been a serious handicap. We know, however, from one or two references and comments that he had access, probably through his Bordeaux friend Barbot,[14] to what represents the third serious effort to publish a comprehensive collection of documents relating to the history of France. This was the *Recueil des historiens*[15] (29 volumes eventually), of which the first five, covering the period from the foundation of the Frankish monarchy, up to and including the reign of Charlemagne, ending in the year 814, were published from 1734 to 1744. Barbot's library contained the first five volumes. Usually, however, Montesquieu gives, as his detailed source on early French history, either a separate edition or the previous official collection, the *Historiae Francorum Scriptores*, edited by André and François Duchesne (Paris 1636-49). Since this collection was in the library at La Brède (cat. 2932), physical access to it was easy, and it also had the advantage that documents such as annals, lives, and histories were usually included in full in one of the volumes, whereas in the later *Recueil* they were divided into chronological parts in different volumes. In any case, although the *Recueil* benefitted from another hundred years of research and collation, documents were often reprinted from the earlier collection with only a small number of very minor amendments.[16] Boulainvilliers, Dubos and Montesquieu all used the documents when they wrote about the constitutional history of France. Montesquieu disagreed with the interpretations put forward by Boulainvilliers and Dubos and arrived at his own independent view of the historical process. A brief look at the conclusions of Boulainvilliers and

Dubos, however will prove instructive as background to Montesquieu's own conclusions.

Henri de Boulainviliers followed in the steps of Jean Le Laboureur, a historian who had been commissioned in 1664 by the *ducs et comtes pairs de France*—the old nobility of the highest rank, to undertake research into the rights and privileges attached to their rank. Le Laboureur's *Histoire de la pairie* was not published until 1740,[17] but it circulated in manuscript and was brought to Montesquieu's attention in 1723.[18] The author equates the barbarian conquerors of France with the nobility and recalls the general assemblies of the first two dynasties in which the *Grands du royaume* deliberated and voted on measures to be taken. According to him, since feudal times the equality of all the nobles has changed, and only those great nobles directly linked to the Crown and equal between each other and superior to all others retain the right to form the king's Council. These conclusions were welcomed by the high nobility, some of whom, including famously the duc de Saint-Simon,[19] had the ear of the Regent and were influential in his decision when he came to power in 1715 to set up the Regency Councils, headed by great nobles, to advise on the conduct of affairs. This experiment, known as the polysynody, lasted but a very short time. By 1718 the secretaries of state again reported directly to the Regent. The polysynody was probably not so much an attempt to put the clock back to feudal times as it was an effort to find a better way of governing France than the centralizing regime of Louis XIV, an effort which failed because it relied on the nobility to act as a governing class, whereas in reality the nobles had not been trained to govern and were no longer accepted by other people in the state as their natural representatives.

Boulainvilliers' *Mémoires historiques* (part of his *Etat de France*) and the *Histoire de l'ancien gouvernement de la France* were the main vehicles for his constitutional theory. Both were first published posthumously in 1727.[20] Like Le Laboureur before him and Saint-Simon after him, Boulainvilliers goes back to the barbarian invasions and claims that the sovereign power was originally shared between the king and the conquering Franks. Unlike the other two writers, however, Boulainvilliers, though not consistent in his views, as Harold Ellis shows,[21] does not recognize any diminution in the rights of the conquerors. For him, all descendants of the Franks are noble and should rightfully share in the sovereignty of the nation while all descendants of the conquered people, the Gallo-Romans, remain non-noble and subservient. No doubt he was influenced by the fact that he himself, though of the old nobility, was not *duc et pair de France*. In any case, in reading his work it has to be remembered that, when he speaks of the liberty and equality of the Franks and claims that their descendants should inherit the same condition, he is speaking for part of the French nation only. He describes the process by which serfs became free and in some cases ennobled, without recognizing this as anything but a corruption of the true position:

> More than forty thousand families mostly coming from serfdom, share the honours and rights formerly reserved to the conquerors of Gaul alone. So that, with no attention paid to the truth of facts vouched for by titles and history, it is today taken for certain that all men being born in the condition of workers, there is no difference between them except that they quitted that state earlier or later. To the point where Denis de Salvain, a well regarded author of the previous century, who wrote about feudal matters, even dared to put the question whether it was claimed that the nobility had fallen from the sky and could have any real privilege other than by concession of the prince.[22]

A little later the *thèse royale* was powerfully reasserted by the abbé Jean-Baptiste Dubos. Dubos was an establishment man. He served the government of France, first as a diplomat in the reign of Louis XIV, then as advisor on matters of state during the Regency, and finally, from 1722 until his death in 1742 as perpetual secretary of the *Académie française.* He began his historical researches into the beginnings of the French monarchy during the Regency period when the question of succession in the event of the death of the young Louis XV was, as we have seen, a very live issue. He prepared a treatise, not published at the time, but later developed into the *Histoire critique de l'établissement de la monarchie française dans les Gaules* (Paris 1734). In that work he refutes the aristocratic thesis by claiming to show from history that the Franks had not entered Gaul as conquerors (there was no record of such a conquest as an individual event) but as allies of Rome, and that absolute sovereignty had been transferred peacefully from the Roman Emperor to the Frankish King, with all other inhabitants being subject to him, a state of affairs inherited by all their successors. Where Boulainvilliers had seen an overwhelming conquest of Roman Gaul by the Franks, which established a permanent relationship of superiority of the victors over the vanquished, Dubos saw a peaceful transfer of absolute power which established a permanent dominance of the king and his successors over all his subjects, whether Gallo-Roman or Frank.

Montesquieu's Historical Argument

Montesquieu does not think highly of either Boulainvilliers or Dubos as historians. Boulainvilliers had in his view "more wit than insight, more insight than real knowledge" (XXX,10). He respects the erudition of Dubos but criticizes the use he made of it:

> This work [the *Histoire critique*] has persuaded many people, because it is constructed very cleverly (*avec beaucoup d'art*); because it presumes everlastingly what is in doubt; because the more that proofs are lacking, the more probabilities

are asserted; because an infinite number of conjectures are invoked as principles, and give rise to other conjectures. The reader forgets his doubts and starts to believe. And as an endless amount of erudition is produced, not as part of the theory, but alongside the theory, the reader's mind is distracted by peripheral matters and does not concern itself with the essential. Besides, it is impossible to suppose that so much research has not found anything; the length of the voyage makes one believe that one has at last arrived (XXX, 23).

Montesquieu's direct attack on Boulainvilliers occupies only a few paragraphs at the beginning of Book XXX, chapter 10, where he argues from the various barbarian laws that as servitude was not a state confined to the Gallo-Romans, nor liberty and nobility confined to the barbarian peoples, Boulainvilliers had failed to demonstrate the essential point of his system. His direct attack on Dubos occupies part of Book XXVIII, chapter 3 and Book XXX, chapter 10, and all of Book XXX, chapters 23, 24 and 25. He argues that Dubos advanced no proof of a peaceful transfer of power and that "when one sees a conqueror enter a state and subdue a large part of it by force and violence, and shortly afterwards one sees the entire state in submission, although history does not describe how the submission occurred, one has good reason to believe that the process continued as it had begun."

Montesquieu concludes that there is considerable evidence for the conquest, though it did not all occur at the same time and not everything in the state was changed by the conquerors. Montesquieu describes the theories of Boulainvilliers and Dubos as, respectively, a conspiracy against the third estate and a conspiracy against the nobility. His own theory is closely argued, with a wealth of documentation, throughout Books XXVIII, XXX, and XXXI. He argues that over many centuries the French monarchy was characterized by a division of sovereign power between the king and other bodies in the state. The balance of power and the composition of the intermediary bodies varied at different times over the period described—about one thousand years. He finds the origin of the French monarchic state in the characteristic organization of the Franks, which was to have a prince surrounded by his trusted followers, who served him and were rewarded by him. This, he says, was the system imported into France with the barbarian invaders. Under Clovis I (481-511) and the Merovingian dynasty, the rewards took the form of grants of land and other advantages (XXX, 3-4). In time the grants of land became hereditary (XVIII, 22; XXVIII, 9). This was the origin of the *seigneurs*, who thus became a landed nobility. These early kings ruled with the help of a Mayor of the Palace, responsible for administration, while the king headed the armed forces. The administrators gradually took over more power, until the two offices were merged under a palace revolution which resulted in a new king, Pepin, and the establishment of the Carolingian dynasty (A.D.751-987).

Montesquieu concludes that assemblies of the "nation" were frequent during the first two dynasties. He explains that only seigneurs and bishops took part, there being no question of commoners yet. Laws enacted by the assemblies were added by the king as capitularies to the codes of law. It was the assembly at Soissons which recognized Pepin as king in 751, and he was consecrated by the pope in 734. Although it is clear that assemblies had a real role during the early history of France, Montesquieu tells us very little about them. He refers to individual capitularies, but scarcely at all to the people concerned or their deliberations. The whole matter is treated almost as an aside in Book XXVIII, chapter 9 as part of the discussion about how the codes of law and the capitularies fell into disuse. He says that once landholding became hereditary, the feudal system extended gradually to all parts of France. Every great or even small seigneur became almost all-powerful in his own little kingdom. National laws almost disappeared because there was no one responsible for enforcing them. The arts of reading and writing almost disappeared also, except within the Church. Written laws were replaced by customs which varied according to each seigneurial domain, and were passed on verbally. This confused system was only gradually and partially brought under control during the Capetian dynasty (987 to the Revolution). The kings gradually gained authority over the whole kingdom, and, as internal peace was established, the learned arts began to flourish again. From about the thirteenth century, Roman law was recognised as the law of the land in parts of the country where its tradition had lingered as a form of customary law, while in the rest of France customs were written down, partially harmonized with each other, and, after being authorised by the regional Parlement, received the royal seal of approval, with Roman law being invoked in case of doubt or in some cases where it brought greater clarity to the situation. The Church meanwhile drew up and administered its own code of canon law.

Montesquieu asserts that the power of judging disputes and crimes had normally and properly accompanied the grants of land. He thought that this was a natural association, not a result of *seigneurs* usurping the royal prerogative as historians of the royal school contended.[23] At the height of the feudal system, an almost infinite number of mostly petty tribunals administered justice in France. This situation had to change with the introduction of Roman law and with settled customary laws and written records that made it possible to compare precedents. Most of the *seigneurs* and their staffs were ill-educated and quite incompetent to handle the work of administering justice, particularly once trial by personal combat or by ordeals by fire and water were no longer acceptable ways of deciding on guilt or innocence. From the thirteenth century and the reign of Saint Louis (Louis XI), procedures gradually changed. Cases were tried in secret instead of openly, the state took over the prosecution of criminal cases, and it became possible to have laws of general application, introduced by ordinances, and to have tribunals with wide authority. The Parlement of Paris, appointed by the king and originally part of the king's Council, at first specialized in appeals

in cases involving the king or members of the nobility or higher clergy. Later it became a general court of appeal and sat permanently in Paris. The press of business became such that provincial Parlements were also set up to act as final courts of appeal in their own areas (XXVIII, 39). Montesquieu stresses the gradual nature of the changes in response to changing circumstances: "All this was done little by little by the force of the thing" (XXVIII, 43).

We have seen that Montesquieu had identified in Book II, chapter 4 a need in a monarchy for an intermediary body to act as the "depository of laws," and had said that this could only exist in the political bodies which announce the laws when they are made and recall them when they are forgotten. He had also said that the ignorance of the nobility, as well as their carelessness and scorn for civil government, disqualified them from fulfilling this role. He does not mention here the Parlements, but his readers would reasonably have concluded that in France the Parlements were the appropriate body to act as the "depository of laws." As he continues the story in Books XXVIII, XXX, and XXXI, he traces changes in the way the sovereign executive, legislative, and judiciary powers had been exercised. There had been *révolutions*—changes in the balance of power between the kings and the nobility, changes in the laws, and changes in judicial procedures. Sometimes power had been too much centralized in the monarch which brought the danger of despotism, and sometimes too decentralized, which brought the danger of breaking up the state. The shifts had twice led to a change of dynasty when the titular king had been superseded by the representative of a more powerful family, as when Pepin and then Charlemagne and the Carolingians superseded the Merovingian line in the eighth century, and when Hugh Capet and the Capetian line replaced the Carolingians at the end of the tenth century. Montesquieu does not present a picture of a state with unchanging fundamental laws and institutions, but rather of a country which had evolved from the simple organization of the Frankish conquerors into a complex monarchical state which had preserved a balance of sovereign powers between the king and other intermediary bodies, and thus had preserved a spirit of liberty and moderation. He does not mention the Estates General held in Capetian times, nor explain when and how the Parlement of Paris, and then the provincial Parlements, became not just a final court of appeal but also the bodies responsible for registering the laws, with the power to make remonstrances before registration. This is no doubt because, whereas in Book XXVIII he took the history of French civil law almost up to his own time, Books XXX and XXXI, which deal with constitutional law, the foundation of the monarchy, and subsequent changes in the way in which it operated, take the story only up to the time when the monarchy and the greatest fief were combined in Hugh Capet and the Capetian line from 987 onwards. He may have hesitated to risk offending Louis XV by comments on the monarchy, but it is also likely that he felt that he could not undertake all the extra work needed to bring the story more up to date, especially since so much in the way of collection, collation, and editing remained to

be done on the relevant manuscript material. Furthermore, even as he composed the last two books of *The Spirit of Laws,* his printers in Geneva were clamoring for the completed work.

Evaluating Montesquieu's Views

Since Montesquieu was critical of other scholars, we need to ask whether his own understanding of constitutional law and history was soundly based. His interest in the history of French law was not a new development. He was building on foundations laid many years before. He graduated in law at Bordeaux University in 1708, with a view no doubt to his expected career as *président* in the Parlement of Bordeaux in succession to his uncle. We do not have the curriculum at Bordeaux, but it probably resembled the course at the University of Paris, described by Henri-François d'Aguesseau, three times Chancellor of France, in the first (dated 27 September 1717) of four *Instructions* addressed to his sons.[24] We learn that the first year of University study in law was devoted to Roman law, still in daily use in France; the second to Roman and Church law; and the third to French law including ordinances and customs. D'Aguesseau recommended a good deal of supplementary study to prepare his eldest son for the post of king's advocate, which he expected him to take up on leaving the University of Paris.

In Montesquieu's case there was a gap between his University studies and his destined career. The older generation was still active, his uncle in the Parlement of Bordeaux, and his father in charge of the family estates and wine business. He spent the years after 1708 in Paris until called home by his father's death at the end of 1713. There is not much evidence of his life and studies in Paris,[25] except for six notebooks, the *Collectio juris*, which have survived.[26] Up to the middle of the sixth notebook, the contents are devoted to a detailed study of the *Digest,* the *Code*, and the *Novellae*, which, along with an introductory work, the *Institutes*, almost certainly studied earlier at University, make up the *Corpus juris civilis*, the compilation of Roman law authorized by the Emperor Justinian I in the sixth century A.D. The rest of the sixth notebook is taken up by notes on customary law, legal maxims and disputed points of law, and by summaries of nine cases, heard in various courts of the Parlement of Paris, about 1711, at which Montesquieu seems to have been present. His own comments on the *Corpus juris* become more detailed and interesting the farther he advances. In addition to the glosses, dating mainly from the twelfth and thirteenth centuries and often included in editions of the text, such as the Lyon edition of 1612 which was at La Brède (cat.705), he makes full use in the *Code* and the *Novellae* of the extremely detailed commentaries by Antoine Mornac,[27] and also of a work by his own near contemporary, Jean Domat,[28] a very distinguished and influential legal expert, who published a new edition, still highly regarded, of the

Roman law, arranged by topics. Most of the references to other commentators such as Cujas, Dumoulin, Faber, and Boerius, are taken from Mornac, at least in the first instance, but there are also references to such later commentators as Bernard Automne[29] and Claude de Ferrière,[30] who were not known to Mornac. By the time Montesquieu returned to Bordeaux, he had acquired a detailed knowledge of at least one of the major branches of European law. This was followed by about twelve years practice in the courts of the Bordeaux Parlement,[31] and very wide general reading including, as can be seen from *The Spirit of Laws,* many books relating to the development of French law.[32]

Montesquieu has often been claimed as a supporter of the *thèse nobiliaire.* Johnson Kent Wright, for example, says that "the historical books which conclude *De l'esprit des lois* certainly provided a more authoritative and attractive version of the *thèse nobiliaire,* establishing it on far securer grounds than did the quasi-racial, voluntarist account of Boulainvilliers."[33] According to Wright:

> It was Montesquieu, far more profoundly than any of his contemporaries, who recognised that the fortunes of the 'regrouped' French nobility of the eighteenth century now depended more than ever on the absolute monarchy whose highest offices in the state, church and military it occupied. If it bears witness to the ineradicable friction that persisted between aristocracy and absolutism in France, it nevertheless faithfully reflects the broad self-confidence of the eighteenth century nobility, now free to enjoy the fruits of its final rapprochement with the monarchy.[34]

I would suggest, however, that it is difficult to reconcile this assessment with *The Spirit of Laws,* the work of Montesquieu's maturity. The main lines of his theory of monarchy are set out, as we have seen, in Book II, chapter 4, but it seems certain both from this chapter and from comments made throughout Books XXVIII, XXX, and XXXI, that he sees the monarchical state in France as something fluid. It evolves over time and does not depend on any set organization. What is essential to the spirit of monarchy is that the king does not govern alone, but with intermediary powers and through recognized channels. He says, as we know, that the most natural of the intermediary powers is the nobility, but he does not specify that the nobility should be organized in a special way to enable it to participate in government. His concern in Book II, chapter 4 seems to be rather that the nobility, like the *seigneurs*, the clergy, and certain other individuals or bodies such as towns should have a particular status and privileges which would enable them, though subordinate to the king, to share in government. He deprecates the loss of jurisdiction by these subordinate and dependent powers, which has occurred over many centuries in a great state in Europe—no doubt he means France—and he makes a graphic comparison: "As the sea seems to want to cover the entire earth and is held up by the plants and small stones on the shores, so monarchs, whose power seems to have no limits, are held up by

the smallest obstacles, and bow their natural pride to complaints and prayers." He does specify however, as we have also seen in the same chapter, the need in a monarchy for an organized body or bodies to serve as the depository of laws, to register and recall them, and he says that neither the nobility nor the monarch's own Council are fit to fulfill this role—the nobility because of their personal shortcomings and contempt for civil government and the Council because it is too much under the influence of the changing will of the monarch. It is true of course that the office holders in the Parlements enjoyed noble status and privileges by virtue of their offices. Some of these office holders came from the old nobility but most formed what was known as the robe nobility. It seems that, when the nobility *as an order in the state* is under consideration by Montesquieu and other political writers such as Saint-Simon and the various writers mentioned in this chapter, they are not thinking of the *noblesse de robe* but of the old nobility. It is the old nobility who are stigmatized by Montesquieu as ignorant and careless. And when he speaks of the bodies responsible for the depository of laws, he does not appear to regard them as part of the nobility. Therefore his silence on the subject of the Estates General may be at least partly explained by assuming that he realized how unsatisfactory was the representation of the three orders in the Estates.

In Book XI, chapter 6 of *The Spirit of Laws*, Montesquieu sets out constitutional arrangements designed to preserve liberty in a state. He is describing here, not such arrangements in general terms, but the actual constitution of England, as he understood it. We may wish that we had from him a similar description of the constitution of France, but we have not. Instead, right at the end of the work, we have what might be called the *thèse évolutionnaire,* a description of how the French constitution had developed historically. It was not Montesquieu's object to propose changes in the way in which France was governed. He was already a successful author when he composed this major work, and no doubt he wished his greatest achievement to be not only published, but widely circulated in his own country. Even as it was, he arranged for publication in Switzerland and for the work then to be imported into France. The censorship was sufficiently relaxed by that time to turn a blind eye to such arrangements, but it is likely that the government censors would have obstructed circulation if the work had contained specific proposals affecting the powers of the king of France. Even if he had felt free to do so, Montesquieu would probably have been cautious about making specific proposals. One of his recurring themes is the need to understand the causes which have led to particular laws and customs. His advice is to move slowly in making changes. For example, though he admires the liberty established by the English constitution as described in XI,6, he ends the chapter by saying:

> I do not intend by this to attack other governments, nor to say that this extreme political liberty should be a reproach to those who have only a moderate degree

> of liberty. How could I say that, I who believe that an excess even of liberty is not always desirable, and that people nearly always adapt better to averages than to extremes?

In the following chapter, Book XI, chapter 7, he goes on to speak of "the monarchies we know," presumably including France, whose object is the honor and reputation (*la gloire*) of the citizens, the state, and the prince, and he says that this quest for *gloire* results in a spirit of liberty which may contribute as much to happiness as liberty itself. In the Preface to *The Spirit of Laws* he says:

> I do not write to censure what is established in any particular country. Each country will find here the reasons for its maxims; and the conclusion naturally suggests itself that the business of proposing changes belongs only to those sufficiently gifted to be able by a stroke of genius to understand fully the constitution of a state. . . . In a time of ignorance people do not hesitate even in perpetrating great evils; in enlightened times they tremble even in bringing about the greatest good. They realize the old abuses, and they see how to correct them, but they also see how the correction may be an abuse. One leaves the evil if one fears something worse, one leaves the good if one is doubtful how to do better. One looks at individual measures in the light of the whole; one examines all the causes in order to assess all the results.

Conclusion

What measures might Montesquieu have favored to improve the government of France had he felt free to consider them? This is very debatable given his opinion about the difficulty of foreseeing the results of changes in the laws. It also needs to be considered that he published his great treatise prior to mid-century. The Parlementary reforms of 1771 were in the future. The king did not see himself as a despot, and in the first half of the eighteenth century, probably most of his subjects did not think of him as such. Though the Parlements were the only intermediary bodies with any legislative functions at the national level, executive power continued to be channelled in many of the traditional ways, often overlapping with the functions of the king's Council, his ministers and/or the recently instituted system of royal intendants. Some provincial governors, such as, in particular, the princes of Condé who held the post of governor of Burgundy in succession from 1632 until 1789,[35] exercised real power in their provinces. Some of the provincial Estates continued to meet, though the extent of their power and influence is a very complex matter.[36] "The crucial point,"observes Richard Bonney, "is that estates in one form or another survived in the four great outlying provinces (Brittany, Burgundy, Provence and, above all, Languedoc), and their continued existence was in itself a limitation on the absolute power of the king." He adds, however, that there were still alternative instru-

ments of government available to the crown in each locality (e.g., Parlements, governors, intendants).[37]

A long tradition of municipal self-government also continued. As Gail Bossenga observes:

> in the Old Regime, individuals were able to exercise civic rights and obtain privileges primarily through their membership in a privileged province, estate or corporate body. Cities were one such type of corporate body that conferred privileges on its members. Typically these included tax exemptions, and the political right of certain inhabitants, usually designated members of professional groups, to elect municipal officials.[38]

All these intermediary bodies, however, were subject to the king's influence, partly through the sale of offices and partly through the pressure which could be brought to bear on office holders by the king, ministers, and intendants.

In light of his admiration for the English constitution as he understood it (XI, 6), perhaps Montesquieu would have proposed, had he lived at the time of the Revolution, some version of the division of sovereign powers between king, lords, and commons, with the judiciary separately organized except occasionally as a last court of appeal. He might have thought that an enhanced role for the Parlements would be in accordance with his expressed opinion that the nobility were the most natural intermediary body in a monarchy, since all the officials of the sovereign courts had either inherited or purchased their offices, which conferred noble status. Such a course would have had grave drawbacks. As Richard Bonney says: "The failure of the Estates-General left a power vacuum which could not be filled by the sovereign tribunals."[39] He gives various reasons for this. One is that each Parlement, as well as the other sovereign courts such as the *chambres des comptes* and the *cours des aides*, had its own *ressort*, or area of competence and its own responsibilities, which might overlap with those of its neighbors. The Parlement of Paris had the largest *ressort* but this still amounted to less than half of the country. It was the most important in its personnel and was first in line to receive new legislation for registration and to have the opportunity to remonstrate, but it was never in a position to dictate to other courts. This severely weakened the position of the French Parlements in comparison with the English Parliament whose competence extended to the whole of the kingdom. Again, the legislative function of the Parlements was very limited. Unlike the Parliament of England, they did not initiate legislation but merely reacted to it and sometimes influenced it behind the scenes. Finally the personnel of the Parlements, being composed of those who had inherited or bought their offices, had no real authority to represent the nation, though they often claimed to do so. In any case, Montesquieu might have regarded any combination of the existing judicial powers of the Parlements with either executive or increased legislative functions as prejudicial to liberty (XI,6). As we have already noticed,

he does not mention the Estates-General in *The Spirit of Laws,* although it seems from a later perspective that the best hope for the survival of a moderate monarchy in France would have lain in the revival of these Estates on a better constitutional basis, providing for frequent, regular meetings, not depending on a summons by the king when and if it suited him, and providing also for improved representation of the various parts of the nation.

All this is speculation. The accusation of despotism in 1771, after the Maupeou reforms, were instituted sounded the death-knell of the Old Regime, and even the restoration of the powers of the Parlements by Louis XVI in 1774 could not repair the damage. The Parlements themselves were foremost in calling for the summoning of the Estates General, a body which the government would find it difficult to coerce. As it turned out, however, the pressures for change after 1771 very quickly became too great to be contained within the institutions of the Old Regime.

One wonders how Montesquieu would have viewed the Revolution of 1789. Perhaps he could have discerned the repetition of a familiar pattern. However much tempered in practice, the sovereign powers had become too much concentrated in the king. It was time for the balance to swing back, away from the crown, but this time it was not a question of a family or an individual becoming powerful enough to take over the sovereignty. No doubt Montesquieu would have preferred changes to take place peacefully, but the appropriate constitutional machinery for peaceful change did not yet exist, even in the Estates General. The lay orders in the three estates had changed very greatly over the centuries. The second order, the nobility, constantly received accessions from the creation of new offices and office holders. The privileges conferred by noble status were not the reward for service to the state. Everyone knew that offices were bought and sold like commodities. Acquiring noble status was always possible for oneself or one's children if one had the money. In the normal course of affairs, those who had acquired the status earlier tended to despise those who acquired it later, but this did not affect the privileges of the new nobility. The justification for the venal system, in the view of Montesquieu, was that it was a way of ensuring that the state's business was carried on and that it tended to stabilize society (V,19). Meanwhile many of the rest of the inhabitants of France—the third estate, about 95 percent of the population—were themselves often quite comfortably off, even wealthy, well educated, and increasingly practised in political debate, but they had no political role except as one part of an Estates General so rarely summoned (the last time had been in 1614), that in 1789 no living person could remember the last occasion. Furthermore, even if the Estates were convened, the representation of the third estate would by no means correspond to their numbers since voting had always been by order rather than by head. Thus there was built in dissatisfaction in society, even among members of the nobility who were already privileged but even more in the third estate, while at the same time constitutional means of expressing and remedying any griev-

ances were very inadequate. This dissatisfaction combined in 1789 with other grievances, including particularly those relating to taxation, and led to an irresistible demand for constitutional change which took everyone by surprise at the time. The Estates-General finally met on 5 May 1789. François Furet has given a good account of the events which then led the Third Estate to set up almost immediately the first National Assembly in place of the Estates-General: "The great act of revolution was accomplished: the Third Estate had destroyed and created a new authority independent of the king."[40] The sovereignty had once again been transferred, and a new constitutional epoch had begun.

For most of the next two hundred and more years, France has been described not as a monarchy but as a republic. Montesquieu, however, might still recognize in his own country a type of moderate state, governed by known laws and with separate powers which act as a check on each other. He might well feel that the spirit of the laws of France—a spirit of liberty and moderation, was more fully realized in today's *République française* than in the monarchy he knew.

Notes

I would like to thank David Carrithers for helpful comments and suggestions on an earlier draft of this chapter.

1. Fundamental laws had evolved over time and were no more than the statement of certain commonly accepted constitutional principles: (1) that the crown of France was not the personal property of the holder but devolved in accordance with the law and custom of France; (2) women, bastards, and heretics were excluded from the crown; (3) the king could not dispose of the domain belonging to the crown, and any personal property which he owned when becoming king would be added to the domain of the crown; (4) the temporal power was independent of the spiritual power i.e., the king, as king, was not subject to the pope, and the pope did not have the right to depose him. All other laws designated as fundamental by the Parlement or writers such as Bodin, Fénélon, and Saint-Simon, were contested by other parties in the state. See Emile Chénon, *Histoire générale du droit français*, 2 vols. (Paris: Recueil Sirey, 1929), II, 410-12 and Michel Antoine, *Le Conseil du Roi sous le règne de Louis XV* (Geneva: Droz, 1970), 13-15.

2. Chénon, *Histoire générale du droit français*, II, 412.

3. Jules Flammermont, ed., *Remontrances du Parlement de Paris au XVIIIe siècle, 3 vols.* (Paris: Imprimerie nationale, 1888-98), III, 157.

4. Jean Egret, *Louis XV et l'opposition parlementaire 1715-1774* (Paris: A. Colin, 1970); Peter Campbell, *Power and Politics in Old Regime France 1720-1745* (London: Routledge, 1996), 228-29.

5. Archives Nationales, K163, Miromesnil to Louis XVI: 4.1.1787, in William Doyle, "Was there an Aristocratic Reaction in Pre-Revolutionary France?" in *Past and*

Present 57 (1972), 97-122 reprinted in William Doyle, *Officers, Nobles and Revolutionaries: Essays on Eighteenth-Century France* (London: Hambledon Press, 1995).

6. François Hotman (1524-90), *Franco-Gallia*, translated as *La Gaule Françoise* (Cologne, Fayard, 1574). See Franklin Ford, "Restatement of the *Thèse Nobiliaire,*" in *Robe and Sword, the Regrouping of the French Aristocracy after Louis XIV* (Cambridge, MA: Harvard University Press, 1953), 222-45.

7. Jean Bodin (1530-1596), *Les Six livres de la république,* first published 1576. There are many editions and translations, including *Six Books of the Commonwealth* in Blackwell Political Texts (Oxford, 1967). For commentary on Bodin, see Richard Bonney, "Bodin and the Development of the French Monarchy," in *Transactions of the Royal Historical Society*, 5th series 40 (London: Royal Historical Society, 1990), 43-61, reprinted in Bonney, *The Limits of Absolutism in Ancien Régime France* (Aldershot, Hampshire: Ashgate Publishing Limited [Variorum Reprints], 1995).

8. Bernard de La Roche-Flavin (1552-1627), *Treize livres des parlements de France* (Bordeaux, 1617, Geneva, 1621). See Franklin Ford, *Robe and Sword,* 223-24.

9. Richard Bonney, "Was there a Bourbon Style of Government?" in Keith Cameron ed., *From Valois to Bourbon: Dynasty, State & Society in Early Modern France* (Exeter: University of Exeter, 1989), reprinted in Bonney, *The Limits of Absolutism in Ancien Régime France,* 176-78.

10. Franklin L. Ford, *Robe and Sword,* 178-79. A.N., K.648, nos.6-11. Ford says that four of the meetings were termed *assemblées générales*, and for these several of the absent peers sent notarized declarations of proxy.

11. Harold Ellis, *Boulainvilliers and the French Monarchy* (Ithaca, NY: Cornell, 1988), 92-93 and 112-18.

12. Henri de Boulainvilliers or Boulainviller (1658-1722). See Renée Simon, *Henri de Boulainviller: historien, politique, philosophe, astrologue* (Paris, 1941) and Ellis, *Boulainvilliers.*

13. Abbé Jean-Baptiste Dubos or du Bos (1670-1742). See A. Lombard, *L'Abbé du Bos, Un Initiateur de la pensée moderne* (Paris: Librairie Hachette, 1913).

14. Jean Barbot, a friend of Montesquieu, and his colleague at the Academy of Bordeaux. It was to Barbot, Guasco, and his son Jean-Baptiste, that Montesquieu read several chapters of *The Spirit of Laws* on 12 February 1745. See Robert Shackleton, *Montesquieu* (Oxford, 1961), 239.

15. Dom. Martin Bouquet, ed., *Recueil des historiens des Gaules et de la France,* 19 vols. (Paris: Palme, 1738-1904, reprinted 1867-71).

16. The editors of these collections, and of the separate collections of capitularies, Barbarian laws, imperial constitutions, etc., seem not to have seen it as their job to interpret the historical significance of documents. Dom Bouquet, first editor of the *Recueil*, writes in the preface to the first volume: "Our intention here is not to write history , but only to compile the acts which may serve for that purpose" (p.iv).

17. Jean Le Laboureur, *Histoire de la pairie de France et du Parlement de Paris ou l'on traite aussi des électeurs de l'empire, & du cardinalat. Par Monsieur D.B.* (London: S. Harding, 1740).

18. *Correspondance,* Nagel, III, 752.

19. Louis de Rouvroy (duc de) Saint-Simon, (1675-1745). His *Mémoires* were not published until after the Revolution.

20. Henri de Boulainvilliers, *Mémoires présentés à Monseigneur le Duc d'Orléans, régent de France. Contenant les moyens de rendre ce royaume très-puisssant, & d'augmenter considérablement les revenus du roi & du peuple. Par le C. de Boulainvilliers* (La Haye et Amsterdam: Aux dépens de la Compagnie, 1727); *Histoire de l'ancien gouvernement de la France, avec XVll lettres historiques sur les Parlements ou Etats-Généraux* (La Haye et Amsterdam: Aux dépens de la Compagnie, 1727).

21. Ellis, *Boulainvilliers and the French Monarchy.*

22. Boulainvilliers, *Histoire de l'ancien gouvernement de la France*, 318.

23. Abbé Claude Fleury, *Histoire du droit français* (1674); le Père Gabriel Daniel, *Histoire de France depuis l'établissement de la monarchie française dans les Gaules* (Paris: D. Mariette, 1720) and Jean Baptiste Dubos, *Histoire de l'établissement de la monarchie française dans les Gaules* (Paris: Osmont,1734).

24. Henri-François D'Aguesseau, *Discours et Œuvres mêlées, nouvelle édition augmentée de plusieurs discours et de ses instructions à ses fils, 3 vols.* (Paris: 1771), III, 8.

25. Shackleton, *Montesquieu*, 8.

26. The ms is in the Bibliothèque Nationale de France, n.a.f 12837-42.

27. Antoine Mornac (1554-1620), *Observationes in viginti quattuor priores libros Digestorum et in quattuor priores libros Codicis* (Paris, 1656)*; Posteriorum viginti sex librorum Pandectarum Synopsis . . .* (Paris, 1660)*; Posteriorum librorum Codicis synopsis* (Paris, 1660). The observations on the first twenty-four books had been published previously in 1616.

28. Jean Domat (1625-1696), *Les Loix civiles dans leur ordre naturel* (Paris: La Clare, 1689-94).

29. Bernard Automne (1587-1666), *La Conférence du droict françois avec le droict roman, en laquelle les titres, loix & paragraphes des Pandectes & du Code du droict civil sont confirmez, interpretez & abrogez par ordonnances royaux, arrests des cours souveraines & auctoritez des plus grands praticiens de France* (Paris, 1610).

30. Claude de Ferrière (1639-1714), *Jurisprudence du Digeste, conférée avec les ordonnances royales, les coutumes de France, et les décisions des cours souverains; ou toutes sortes de matières du droit romain, & du droit coutumier, sont traitée suivant l'usage des provinces de droit écrit & de l'usage de la France coutumière,* 2 vols (Paris: Chez Jean Cochart, 1667); *La Jurisprudence du Code de Justinien. Conférée avec les ordonnances royaux, les coutumes de France, et les décisions des cours souverains, 2 vols.* (Paris: Chez Jean Cochart, 1684); *La jurisprudence des Nouvelles de Justinien; conférée*

*avec les ordonnances royaux, les coutumes de France, et les décisions des cours souverains (*Paris: Chez Jean Cochart, 1688).

31. Shackleton, *Montesquieu,* 14-20.

32. Françoise Weil , "Les lectures de Montesquieu," *Revue d'histoire littéraire de la France,* 57 (1957): 494-514 and Iris Cox, *Montesquieu and the History of French Laws* (Oxford: Voltaire Foundation, 1983), 71-81.

33. Johnson Kent Wright, *A Classical Republican in Eighteenth Century France, The Political Thought of Mably* (California: Stanford University Press, 1997), 129-30.

34. Wright, *Mably,*129-30.

35. Beth Nachison, "Absentee Government and Provincial Governors in Early Modern France: The Princes of Condé and Burgundy, 1660-1720," *French Historical Studies*, XXI, no. 2 (spring 1998): 265-97.

36. Franklin Ford, *Robe and Sword*, 193-94.

37. Richard Bonney, "Absolutism: What's in a Name?" in *French History* I (1987), 93-117, reprinted in Bonney, *The Limits of Absolutism in Ancien Régime France*, 112.

38. Gail Bossenga, "City and State: An Urban Perspective on the Origins of the French Revolution," in *The French Revolution and the Creation of Modern Political Culture*, 4 vols. (New York: Pergamon Press, 1987-1994), Volume I: *The Political Culture of the Old Regime,* Keith M. Baker, ed. (Oxford, 1987), 116.

39. Richard Bonney, "The English and French Civil Wars," in *History* 65 (London: Historical Association, 1980), 365-82, reprinted in Bonney, *The Limits of Absolutism,* 380-81.

40. François Furet and Denis Richet, *The French Revolution* (New York: Macmillan, 1970), 70.